

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONNA M. PETERS
Claimant

VS.

**RESOURCE CENTER FOR INDEPENDENT
LIVING**

Respondent

AND

ACE AMERICAN INSURANCE COMPANY

Insurance Carrier

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Docket No. 1,040,954

ORDER

Respondent appeals the January 8, 2010, Award of Administrative Law Judge Steven J. Howard (ALJ). Claimant was awarded benefits for a 14 percent permanent partial whole body disability¹ for injuries suffered on June 14, 2007, after the ALJ determined that claimant had suffered an accidental injury which arose out of and in the course of her employment with respondent.

Claimant appeared by her attorney, Daniel L. Smith of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Ryan D. Weltz of Overland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. At oral argument to the Board, the parties agreed that claimant had been paid 24 weeks of temporary total disability compensation (TTD) at the rate of \$244.01 totaling \$5,856.24. Additionally, it was acknowledged that this record contains no task loss opinion and as of February 2009, claimant began working for Dollar General earning \$7.25 and working 28 hours per week. This calculates to a weekly wage

¹ The award grants claimant a 14 percent work disability, when a whole body disability was actually intended by the ALJ.

of \$203.00 and a wage loss of 45 percent pursuant to K.S.A. 44-510e.² The Board heard oral argument on April 6, 2010.

ISSUES

1. Did claimant suffer personal injury by accident which arose out of and in the course of her employment with respondent? Respondent contends that the accident which occurred while claimant was transporting her mother and another caregiver to a medical appointment was of a personal nature and not related to her job. Claimant contends the trip was necessitated by the care the patient (her mother) required.
2. Is claimant entitled to unauthorized medical treatment? This issue is dependent on the determinations made with issue # 1.
3. Is claimant entitled to future medical treatment? This issue is dependent on the determinations made with issue # 1.
4. What is the nature and extent of claimant's injuries and the amount of compensation due? Respondent contends that claimant should be limited, based upon the opinion of board certified orthopedic surgeon David J. Clymer, M.D., to a 13 percent functional impairment to the right upper extremity only, with no permanent disability for the alleged injuries to claimant's neck, back, knees or left upper extremity. Claimant contends the opinions of board certified orthopedic surgeon Edward J. Prostic, M.D., and internal medicine specialist Daniel D. Zimmerman, M.D., are the most credible and claimant is entitled to a 20 percent whole person impairment from the injuries suffered on June 14, 2007.

FINDINGS OF FACT

Claimant began working for respondent as a personal care attendant in 1998. She was assigned to care for her mother, Donna O'Brien, who has been diagnosed with emphysema, Parkinson's disease, poor vision, liver problems and poor mobility. Claimant cared for her mother approximately 40 hours per week, driving her mother to medical appointments and assisting her in the home. Claimant normally worked from 8:00 a.m. to 4:00 p.m. On nights and weekends, claimant's mother was cared for by another employee of respondent identified as Lawrence Crabtree. Mr. Crabtree also shared Ms. O'Brien's home.

On June 14, 2007, Mr. Crabtree had a medical appointment in Joplin, Missouri. Ms. O'Brien was concerned about Mr. Crabtree's ability to drive to and from Joplin safely.

² Claimant's average weekly wage at respondent was \$366.00.

She wanted to accompany Mr. Crabtree on the trip. Claimant testified that whenever her mother wanted to go somewhere, claimant would have to accompany her. On this occasion, claimant was concerned about Mr. Crabtree's ability or inability to properly care for claimant's mother. Claimant determined that if her mother was going to accompany Mr. Crabtree to the appointment, it would be necessary for claimant to go along. Claimant testified that Mr. Crabtree would be unable to attend to her mother while on the trip. Claimant drove Mr. Crabtree's car to the appointment.

On June 14, at approximately 11:00 a.m., the car claimant was driving was struck broadside by a car belonging to the Joplin Police Department, after claimant failed to stop at a red light. Claimant suffered serious injuries, including fractures of the radius and ulna in her right arm. Claimant contends she also developed problems in her neck, low back, both knees and left upper extremity. Claimant underwent two surgeries to her right upper extremity, involving the insertion of numerous plates and screws to repair the damage. Claimant was initially treated by David A. Ball, M.D., in Joplin, Missouri. Dr. Ball provided no treatment for claimant's neck, back, knees or left upper extremity. Claimant acknowledged that she did not complain to Dr. Ball regarding any of these areas of her body or of the alleged headaches claimant testified to. Claimant had back pain before the accident and had been treating herself with muscle relaxers.

Claimant was referred by her attorney to Dr. Zimmerman on March 5, 2009. Dr. Zimmerman diagnosed claimant with fractures of the right radius and ulnar fractures, post surgery. He assessed claimant a 24 percent impairment to the right upper extremity for these injuries, citing Table 34, page 65 of the fourth edition of the *AMA Guides*.³ He also diagnosed claimant with range of motion limitations in her neck and low back, osteoarthritis at L3-4, limited range of motion in the right upper extremity and weakness in the right arm as compared to the left. Claimant was rated at 24 percent to the right upper extremity (14 percent to the whole person), 9 percent to the whole person for the low back limitations and 5 percent to the whole person for the cervical paraspinous myofascitis, all related to the automobile accident on June 14, 2007, for a combined 26 percent whole person impairment.

Claimant was referred by respondent to board certified orthopedic surgeon David J. Clymer, M.D., for an evaluation on June 15, 2009. Claimant gave a history of injury from the automobile accident resulting in the fractures to the right arm. Other areas of claimant's body developed discomfort, including the neck and low back. During the examination, claimant complained of discomfort in her neck, right upper back, right shoulder, right forearm, right wrist and right hand, and chronic pain in her low back and bilateral knees. Examinations of the cervical spine and low back resulted in no limitation of motion, with the only range of motion loss being in the right arm. Claimant was rated at

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

13 percent to the right upper extremity pursuant to the fourth edition of the *AMA Guides*⁴ for the injuries suffered in the automobile accident of June 14, 2007.

Claimant was referred by the ALJ to Dr. Prostic for an independent medical evaluation on July 21, 2009. The Order referring claimant to Dr. Prostic specifically requested a functional impairment with the physician to reference the fourth edition of the *AMA Guides*⁵, including the page and chart used by the doctor. Additionally, K.S.A. 44-510e mandates any functional impairment opinion be pursuant to the fourth edition of the *AMA Guides*.⁶ The report of Dr. Prostic references no page or chart number and makes no mention of which version of the *AMA Guides*, if any, was used in the evaluation of claimant. The failure of Dr. Prostic to follow the mandate of the statute and the instructions of the ALJ results in the functional impairment opinion of the doctor being excluded in this matter. The Board will not consider Dr. Prostic's rating opinion when rendering its decision herein.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁷

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁸

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁹

⁴ *AMA Guides* (4th ed.).

⁵ *AMA Guides* (4th ed.).

⁶ *AMA Guides* (4th ed.).

⁷ K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

⁸ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁹ K.S.A. 2006 Supp. 44-501(a).

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”¹⁰

Respondent argues that claimant’s trip to Joplin was for a purpose not related to her job. The Board disagrees. While claimant may have been driving Mr. Crabtree’s car and it was for Mr. Crabtree’s medical appointment, the reason claimant was there was to ensure the care of Ms. O’Brien, her charge. Claimant was not there to render service to Mr. Crabtree. Claimant was concerned that Mr. Crabtree would be unable to properly care for Ms. O’Brien. The care of Ms. O’Brien was claimant’s responsibility and the accident occurred during the hours claimant normally administered to Ms. O’Brien. The Board finds that claimant suffered the accident while performing her job duties for respondent, namely attending to the care and welfare of Ms. O’Brien. The award of benefits is, therefore, affirmed.

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.¹¹

The impairment opinions of the doctors vary widely in this matter. Dr. Zimmerman found claimant to have suffered a plethora of injuries from this accident. However, claimant was treated by Dr. Ball after the accident only for the right arm injuries. No treatment was provided for claimant’s cervical spine, low back, knees or left upper extremity. Dr. Clymer found impairment only in the right upper extremity, which more mirrors claimant’s treatment regime. The Board finds the opinion of Dr. Clymer, that claimant suffered only permanent impairment to the right upper extremity, to be supported by this record. As Dr. Clymer rated claimant at 13 percent to the right

¹⁰ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

¹¹ K.S.A. 44-510e(a).

upper extremity and Dr. Zimmerman rated the right upper extremity at 24 percent, the Board finds the actual impairment from this accident to be somewhere in the middle. Giving both doctors' opinions equal weight, the Board awards claimant an 18.5 percent functional impairment to the right upper extremity at the level of the arm for the injuries suffered on June 14, 2007. The Award is modified accordingly.

The award of unauthorized medical expenses in the amount of \$300.00, the award of all authorized medical expenses and the award of future medical treatment upon application to the Office of the Director are all affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant an 18.5 percent permanent partial disability to the right upper extremity on a functional basis but affirmed in all other regards. Claimant has proven that the injuries suffered in the automobile accident on June 14, 2007, arose out of and in the course of her employment with respondent. As claimant's permanent disability is limited to her right upper extremity pursuant to K.S.A. 44-510d, no work disability can be awarded under K.S.A. 44-510e.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated January 8, 2010, should be, and is hereby, modified to award claimant an 18.5 percent permanent partial disability to the right upper extremity at the level of the arm, but affirmed in all other regards.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Donna M. Peters, and against the respondent, Resource Center For Independent Living, and its insurance carrier, Ace American Insurance Company, for an accidental injury which occurred on June 14, 2007, and based upon an average weekly wage of \$366.00.

Claimant is entitled to 24 weeks of temporary total disability compensation at the rate of \$244.01 per week totaling \$5,856.24, followed by 34.41 weeks at the rate of \$244.01 per week totaling \$8,396.38 for an 18.5 percent permanent partial disability on a functional basis to the right upper extremity at the level of the arm, making a total award of \$14,252.62.

As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of May, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant
Ryan D. Weltz, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge